Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

HIRAM THOMAS CARR,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court committed plain error when denying post-conviction motion to take judicial notice?

2. Whether the Trial Court erred when denying post-conviction extraordinary motion to re-order production of discovery materials heretofore concealed and extraordinary motion to order transcript of proceedings in case at bar?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

APPENDIX iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

ARGUMENT

I. The Petition Should Be Granted Because The Courts Below Failed To Follow Rule 201(d) Of The Federal Rules of Evidence 9

II. This Court Should Grant The Petition Because The Government Acquiesced To The Magistrate Judge's Two Orders To Produce, And Subsequently Did Not Appeal From Either Of Those Orders To The District Court, It Voluntarily Gave Up The Right Of Appeal To This Court From Those Orders, As Presented In Thomas v. Arn 16

CONCLUSION 18

APPENDIX

A Copy Of Order Granting Appellee USA's Motion To Dismiss Appellant's Appeal In Case No. 98-10411 . 1a

A Copy Of General Order On Pre-Trial Motions Entered By U.S. Magistrate Judge 2a

A Copy Of Order On Pre-Trial Motions Entered By U.S. Magistrate Judge 9a

A Copy Of Order Denying Defendant's Motion Requesting The Court To Take Judicial Notice . . 13a

A Copy Of Order Denying Defendant's Motion To Re-Order Production Of Discovery Materials Heretofore Concealed And Extraordinary Motion To Order Transcript Of Proceedings In Case At Bar 14a

A Copy Of Order A Three Judge Panel Denying Appellant's Motion For Findings And Conclusions And Motion To Enlarge, Etc. 15a

TABLE OF AUTHORITIES

18 U.S.C.§2 3

18 U.S.C.§1341 3

28 U.S.C.§636(b)(1)(A) 15

28 U.S.C.§1254(1) 1

42 U.S.C.§1320 3

Rules of Supreme Court: Rule 10.1 1

Federal Rules of Criminal Procedure
Rule 12.1(6) 16

Federal Rules of Criminal Procedure
Rule 58(g)(2)(A) 16

Federal Rules of Evidence: Rule 201 5,6,8,9,10,12

28 Am.Jur.2d§35 8,10

Constitution of the United States:
Fifth Amendment 16

Brady v. Maryland, 373 US 83, 10 L.Ed. 2d
215, 83 S. Ct. 1194 14,17

Giglio v. United States, 405 US 150,
31 L.Ed.2d 104, 92 S.Ct. 763 14,17

INS v. Cardoza-Fonsece, 480 US 421, 94
L.Ed.2d 434, 107 S.Ct. 1207 11

Jencks v. United States, 353 US 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007 14,17

Kyles v. United States, 514 US 419, 131 L.Ed.2d 490, 115 S.Ct. 1555 14,17

Shapleigh v. Mier, 299 US 468, 81 L.Ed. 355, 57 S.Ct. 261 10

Thomas v. Arn, 474 US 140, 88 L.Ed.2d 435, 106 S.Ct. 466 16

United States v. Butler, 297 US 1, 80 L.Ed. 477, 56 S.Ct. 312 11

United States v. Lowery, Case No. 97-368-Cr-Zloch (S.D.Fla. 1998) 12

OPINION BELOW

The United States Court of Appeals for the 5th Circuit issued a judgement without opinion rendered, granting Appellee USA's Motion to Dismiss Appellant's Appeal in Case No. 98-10411.

JURISDICTION

Petitioner submits that Title 28 U.S.C. §1254(1) confers jurisdiction on this Court. Jurisdiction is further urged pursuant to Supreme Court Rule 10.1 because the United States Court of Appeals for the Fifth Circuit has:

(a) decided an important question of federal law which has not been, but should be, settled by this Court; and

(b) so far departed from the accepted and usual course of judicial proceedings and so far sanctions this departure by a lower Court as to call for an exercise of this Court's power of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C.§2 3

18 U.S.C.§1341 3

28 U.S.C.§636(b)(1)(A) 15

28 U.S.C.§1254(1) 1

42 U.S.C.§1320 3

Rules of Supreme Court Rule 10.1 1

Federal Rules of Criminal Procedure:
Rule 12.1(6) 16

Federal Rules of Criminal Procedure:
Rule 58(g)(2)(A) 16

Federal Rules of Evidence: Rule 201 5,6,8,9,10,12

28 Am.Jur.2d§35 8,10

Constitution of the United States:
Fifth Amendment 16

STATEMENT OF THE CASE

(a)

The Petitioner and two other Defendants were indicted on four true bills returned by the Federal Grand Jury in Amarillo, Texas during June-November 1996, alleging, inter alia, multiple violations of Medicaid and Mail Fraud Statutes. 18U.S.C.§1341,2;42U.S.C.§1320 et seq.

During Pre-Trial proceedings, Petitioner's counsel filed numerous discovery motions to which, in part, the Respondent (Appellee USA) objected. A U.S. Magistrate Judge entered two discovery orders wherein Appellee USA was ordered to produce important discovery materials. Appellee USA did not appeal to the District Judge for relief from the subject discovery orders. Copies of the subject orders, respectively, are as Appendix 2a and 9a.

On January 21, 1997, trial commenced in the case at bar. On January 31, 1997, the Jury returned a verdict of guilty as to most of the Medicaid and Mail Fraud counts returned in the fourth true bill.

On April 8, 1997, the District Court committed the Petitioner to the custody of the Bureau of Prisons for a term of 21 months with 3 years' supervised release; restitution of $35,515.50; and special assessment of $1,100.00.

On April 1, 1997, the District Court, *Sua Sponte*, amended the earlier order which did little to change the terms of the original J & C order.

Defense Counsel did not file a Notice of Appeal from the underlying conviction and sentence.

On January 6, 1998, while serving sentence at the Federal Medical Center located in Fort Worth, Texas, the Petitioner filed a Post-Conviction Motion to Take Judicial Notice and Memorandum of Law in the underlying case. Appellee USA acquiesced to said motion.

On January 30, 1998, the Petitioner filed Extraordinary Motion to Re-Order Production of Discovery Materials Heretofore Concealed; Extraordinary Motion to Order Transcript of Proceedings in Case at Bar; and Memorandum of Law. Appellee USA acquiesced to said motions.

On March 24, 1998, the District Court denied Petitioner's Motion to Take Judicial Notice. Said order provided no findings or conclusions. A copy of said order is attached as Appendix 13a.

On March 24, 1998, the District Court denied Petitioner's Extraordinary Motions for Discovery and Transcript. Said order provided no findings or conclusions. A copy of said order is attached as Appendix 14a.

On April 1, 1998, the Petitioner filed a timely Notice of Appeal from the aforesaid orders denying Motion to Take Judicial Notice and Extraordinary Motions, etc. to the Court of Appeals for the Fifth Circuit.

On February 26, 1999, the Clerk for the Fifth Circuit ordered Petitioner's Brief was sufficient.

On March 15, 1999, Appellee USA filed Motion to Dismiss Appeal or Alternatively for an Extension of Time and Brief in Support.

On March 25, 1999, Petitioner filed Appellant's Objection to Appellee USA's Motion to Dismiss.

On April 12, 1999, a three judge panel granted Appellee USA's Motion to Dismiss and denied Appellee USA's Motion for Extension of Time as moot. A copy of said Order is attached as Appendix 1a.

On April 22, 1999, Petitioner filed Appellant's Motion for Findings and Conclusions with exhibits and Motion to Enlarge Time to File Motion for Reconsideration.

On May 5, 1999, a three judge panel denied Appellant's Motion for Findings and Conclusions and Motion to Enlarge, etc. A copy of said Order is attached as Appendix 15a.

(b)

On January 6, 1998, while serving a 21 month sentence at the Federal Medical Center located in Fort Worth, Texas, Appellant filed a Pro Se Post-Conviction Motion to Take Judicial Notice and Memorandum of Law wherein the District Court was moved to take notice of adjudicative facts in the case at bar. Rule 201(d), Federal Rules of Evidence. Appellant's Motion provided, inter alia:

(a) That the facts noticed were the linchpin to a forthcoming motion for discovery; and if that motion is granted, to a subsequent Petition for Writ of Error Coram Nobis.

(b) That the forthcoming motion for discovery will provide facts and law on which the Court will decide whether Government Prosecutors demonstrated

contempt for two Pretrial orders to produce discovery materials. The discovery requested will prove the Government failed to produce as ordered.

(c) That the forthcoming Petition for Writ of Error Coram Nobis will provide fac ; and law on which the Court will decide whether Government Prosecutors committed fraud upon the Court, the Grand Jury, the Petit Jury at trial, and the Carr Defendants, *ab initio*, for which relief should be granted.

(d) That the function of a Petition for Writ of Error Coram Nobis is to bring attention of the court to, and obtain relief from, errors of fact, such as a valid defense existing in facts of case, but which, without negligence on Petitioner's part, were made through fraud and neglect, where facts did not appear on the face of the record through Grand Jury, Pre-Trial, Trial and Sentencing Proceedings.

Observation: The Government filed no objection to Carr's motion. Carr was entitled to an order granting motion to take judicial notice. FRE201(d).

On January 30, 1998, Carr filed (a) Extraordinary Motion to Re-Order Production of Discovery Materials Heretofore concealed and (b) Extraordinary Motion to Order Transcript of Proceedings in Case at Bar. The purpose in filing those Motions was to move the Court to order the Government (for the third time) to produce discovery materials that were under their custody or control (or were known to them or should have been known to them) that prior thereto were fraudulently concealed form Carr and were not produced as ordered. As Carr explained in detail, a

competent Petition for Writ of Error Coram Nobis he planned to prepare and file would provide the most expeditious pleading through which the fourth true bill on which he was tried, and in part was convicted, could be dismissed with prejudice; and, additionally, the judgment and commitment order sentencing him to a term of imprisonment and other penalties, likewise, could be vacated with prejudice.

Observation: The Government filed no objection to Carr's Extraordinary Motions. Carr was entitled to an order granting those motions.

On March 23, 1998, the District Court entered two orders denying Carr's motions. The first order provided:

> On this date came for consideration the Pro Se motion filed by defendant Hiram T. Carr on January 6, 1998 requesting the Court to take judicial notice of certain allegations of fact. Defendant's Motion is DENIED. It is so ordered.

The second order provided:

> On this date came for consideration the Pro Se motion filed by Defendant Hiram T. Carr on January 30, 1998 requesting the Court to compel the production of certain allegedly exculpatory documents, to permit discovery for his attorneys and the Government and its agents, and to provide a free transcript of all Grand Jury, Pre-Trial, and Trial Proceedings in this case. Defendant's Motion is DENIED. It is so ordered.

Observation: The Court erred when stating "and to provide a free transcript, etc." Carr <u>did not request</u>

> free transcripts in the subject Extraordinary Motions.

The two orders denying the relief provided no findings of fact or conclusions of law; violated Carr's right of due process of law; and acted to obstruct justice.

> The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. . . (emphasis added)

In Federal Courts, a Judge must take judicial notice of a fact, although it may not be within the Court's knowledge, if the fact in question is one which is the proper subject of judicial cognizance and the party seeking to have the fact noticed has provided the necessary proof because the Federal Rules of Evidence require the judge to take notice under those conditions. 28 Am.Jur.2d §35.

The Trial Court was briefed in the first paragraph of Carr's motion that:

> Defendant, Hiram T. Carr, Pro Se, moves this Honorable Court to take judicial notice of the following adjudicative facts. Federal Rules of Evidence 201(d).

REASONS FOR GRANTING WRIT

ISSUE I

DID THE TRIAL COURT COMMIT PLAIN ERROR WHEN DENYING POST-CONVICTION MOTION TO TAKE JUDICIAL NOTICE?

On January 6, 1998, while serving a twenty-one month sentence ordered in the underlying case, Petitioner/Appellant Hiram T. Carr (hereinafter "Carr") prepared and filed a Pro Se Post-Conviction Motion to Take Judicial Notice with Memorandum of Law, hereinafter "Carr's motion."

Rule 201 of the Federal Rules of Evidence is the only federal rule which applies to judicial notice. The rule applies to taking notice of adjudicative facts and specifies when a Court may or must take notice of such facts.

Rule 201(d) of the Federal Rules of Evidence is compelling and provides that a Court shall take judicial notice if requested by a party and supplied with the necessary information.

The Advisory Committee Notes as to Rule 201(d) provide, inter alia, that:

> The taking of judicial notice <u>is mandatory</u>, under subdivision (d), only when a party requests it and the necessary information is supplied. . . (emphasis added)

In Federal Courts a Judge must take judicial notice of a fact, although it may not be within the Court's knowledge,

if the fact in question is one which is the proper subject of judicial cognizance and the party seeking to have the fact noticed has provided the necessary proof because the Federal Rules of Evidence require the Judge to take notice under those conditions. 28 Am.Jur.2d §35.

The Trial Court was briefed in the first paragraph of Carr's motion that:

> Defendant Hiram T. Carr, Pro Se, moves this Honorable Court to take judicial notice of the following adjudicative facts. Federal Rules of Evidence 201(d).

Therefore, the opening paragraph, *id.*, satisfied Carr's duty under Rule 201(d).

Ordinarily, a party seeking to take advantage of judicial notice in the course of presenting evidence should bring the matter it wants judicially noticed to the attention of the Court so that if there is a ground upon which it may be contradicted or explained, the adverse party will be afforded the opportunity to do so. *Shapleigh v. Mier*, 299 U.S. 468, 81 L.Ed. 355, 57 S.Ct. 261, 113 ALR 253.

A careful reading of the underlying record provides that the Government, the Respondent/Appellee in this case, did not reply or object to Carr's Motion. Therefore, a disinterested observer would conclude the Government willfully acquiesced to Carr's Motion. The Government offered no reason for the District Court to deny Carr's Motion.

CONCLUSION

Courts may not shut their minds to truths that all others can see and understand and are not at liberty to entirely disregard facts of general knowledge on which the Courts are cognizant. *United States v. Butler*, 297 U.S. 1, 80 L.Ed. 477, 56 S.Ct. 312.

Recently, a District Judge in another circuit commented:

> Indeed, the plain language approach to a statute is essentially a rational approach. As the interpreters partners of Congress, the Courts have a responsibility to review the text of a statute with a commonsense degree of precision in an effort to ascertain the meaning of a statute. The commonsense reliance upon the plain statutory language also helps Courts avoid the danger of mistakenly substituting their will for that of the legislature. For as United States Supreme Court Justice Anthony Scalia correctly and succinctly stated in his concurrence in *INS v. Cardoza-Fonsece*, 480 U.S. 421, 451 (1987):
>
> > "Judges interpret law rather than reconstruct legislator's intentions. Where the language of these laws is clear, we are not free to replace it with an unenacted legislative intent."

Quoting order entered on August 4, 1998 at Page 7, in *United States v. Lowery*, Case No. 97368-CR-ZLOCH (S.D.Fla.1998).

Given all of the aforesaid facts, the Petitioner suggests that a Court of Appeals should entertain a significant doubt about the District Judge's decision to deny a mandatory Motion to Take Judicial Notice under FRE 201(d) as to adjudicative facts leading to discovery of prima facie proof that fraud was committed by the Prosecution Team and Petitioner's Defense Counsel upon the Amarillo Grand Jury; a U.S. District Judge; a U.S. Magistrate Judge; the Petit Jury at Trial and the Petitioner. The failure of the Appellate Court to address this departure from the law with respect to judicial notice under FRE 201(d) violates the Petitioner's right of due process of law such that this Court should exercise certiorari jurisdiction.

ISSUE II

DID THE TRIAL COURT ERR WHEN DENYING POST-CONVICTION EXTRAORDINARY MOTION TO RE-ORDER PRODUCTION OF DISCOVERY MATERIALS HERETOFORE CONCEALED AND EXTRAORDINARY MOTION TO ORDER TRANSCRIPT OF PROCEEDINGS IN CASE AT BAR?

On January 30, 1998, three weeks after filing Motion to Take Judicial Notice in the underlying case, Defendant/Appellant Carr prepared and filed Extraordinary Motion to Re-Order Production of Discovery Materials Heretofore Concealed and Extraordinary Motion to Order Transcript of Proceedings in Case at Bar (hereinafter "Carr's Extraordinary Motions").

The preliminary statement found in the memorandum of Carr's Extraordinary Motions provide that:

> The purpose in filing the Extraordinary Motions for discovery and the underlying transcript by Defendant, Hiram T. Carr (hereinafter "Dr. Carr") is to move this Honorable Court (a) to order Government Prosecutors (for the third time [*see* previous orders at D.E. 85-1 198-1] to produce discovery materials that were under their custody or control (or were known to them or should have been known to them) that heretofore <u>were fraudulently concealed</u> from Dr. Carr during important times in the case at bar and were not produced as ordered; and (b) to order the transcript of underlying Grand Jury, Pre-Trial, Trial and Post-Trial

> Proceedings so that Dr. Carr may have access to accurate records and evidence on which he may rely to prepare and submit a competent Petition for a Writ of Error Coram Nobis on which relief could be granted.

Carr briefed the District Court and the Government that the statement of issues holding to the subject motions to produce and transcribe were:

(a) Whether on Defendant's Motions United States Magistrate Judge twice ordered Government Prosecutors to produce all discovery materials under their custody or control.

(b) Whether orders to produce included *Brady, Kyles, Giglio, Jencks* and other discovery materials.

(c) Whether Government Prosecutors appealed orders to produce.

(d) Whether Government Prosecutors concealed exculpatory and impeaching evidence during Amarillo Grand Jury Proceedings that exonerated Dr. Carr of Medicaid and Mail Fraud allegations.

(e) Whether Government Prosecutors concealed exculpatory and impeaching evidence at trial that exonerated Dr. Carr of Medicaid and Mail Fraud allegations on which he defended.

(f) Whether Government Prosecutors concealed exculpatory and impeaching evidence at sentencing that exonerated Dr. Carr of Medicaid and Mail Fraud allegations on which he was convicted.

(g) Whether Government Prosecutors concealed exculpatory and impeaching evidence after sentencing that exonerated Dr. Carr of Medicaid and Mail Fraud conviction on which he was imprisoned.

(h) Whether Dr. Carr now has a lawful right of access to and use of exculpatory and impeaching discovery materials heretofore concealed from him and the transcript of all underlying proceedings on which he may rely to prepare and submit an accurate Petition for a Writ of Error Coram Nobis on which relief could be granted. In a nutshell, Carr's memorandum provided:

(a) That during Pre-Trial, Defense Counsel filed many pleadings including very specific discovery motions that are relative to this appeal.

(b) That the Government objected as to those motions.

(c) That the Magistrate Judge twice ordered the Government to produce the discovery materials Defense Counsel requested, *id.* At (a).

(d) That the Government did not appeal from the subject Magistrate Orders, *id.*, to the Trial Court. 28 U.S.C.§636(b)(1)(A).

That statute provides, inter alia, that:

> A Judge may designate a Magistrate to hear and determine any Pre-Trial matter pending before the Court. . . A Judge of the Court may reconsider any

> Pre-Trial matter under this subparagraph (A) where it has been shown that the Magistrate's order is clearly erroneous or contrary to law.

As the record on appeal provided, the Government did not appeal from either of the subject two orders albeit that criminal rules provide for an interlocutory appeal had the Government so chosen. Federal Rules of Criminal Procedure: Rule 58(g)(2)(A). That rule provides, inter alia, that:

> **(A) INTERLOCUTORY APPEAL**: A decision or order by a Magistrate Judge. . . under any provision of law, shall be subject to an appeal to a Judge of the District Court provided such appeal is taken within 10 days of the entry of the decision or order.

When the Government acquiesced to the Magistrate Judge's two orders to produce, and subsequently did not appeal from either of those orders to the District Court, it voluntarily gave up the right of appeal to this Court from those orders. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S.Ct. 466 (1985).

CONCLUSION

The Government had a duty to produce all exculpatory and impeaching evidence that exonerated the Carr Defendants and they failed in that duty. Federal Rules of Criminal Procedure: Rule 12.1(6); Fifth Amendment.

The discovery materials that the Magistrate Judge ordered the Government to produce during Pre-Trial Proceedings included *Brady, Kyles, Giglio, Jenck's* and other discovery materials (that were under their custody and control) were tantamount to exculpatory or impeaching evidence that exonerated Carr and separately, his son, Defendant Charles T. Carr, of all allegations of Medicaid and Mail Fraud as Carr's memorandum detailed.

Carr's memorandum briefed the District Court that fraud was committed by the Government, *ab initio*; that Carr and his son suffered as a result of that fraud; and that by giving Carr access to the same discovery materials that should have been produced at Pre-Trial, but were not, he would have evidence on which he could use to prepare and file a competent petition for Writ of Error Coram Nobis on which relief could be granted.

Given all of the aforesaid facts, the Petitioner suggests that a Court of Appeals should entertain a significant doubt about the District Judge's decision to deny Petitioner's Extraordinary Motions on which he intended to prove fraud was committed by the Prosecution Team and Defense Counsel upon the Amarillo Grand Jury; a U.S. District Judge; a U.S. Magistrate Judge; the Petit Jury at Trial; and the Petitioner and his son. The failure of the Appellate Court to address the urgency of Petitioner's Extraordinary Motions, as well as the ultimate purpose of those motions, violates the Petitioner's right of due process of law such that this Court should exercise certiorari jurisdiction.

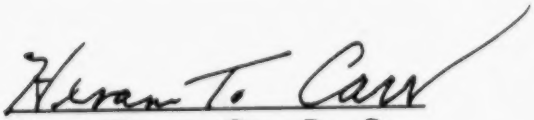
CONCLUSION

For the above-stated reasons, the Petitioner respectfully requests that this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be granted because the Court:

(a) decided an important question of federal law which has not been, but should be, settled by this Court; and

(b) so far departed from the accepted and usual course of judicial proceedings and so far sanctions this departure by a lower Court as to call for an exercise of this Court's power of jurisdiction.

Respectfully submitted,



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No. 98-10411

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGES: Before POLITZ, BARKSDALE and STEWART, Circuit Judges.

BY THE COURT: IT IS ORDERED that appellee's motion to dismiss the appeal is **GRANTED**.

IT IS FURTHER ORDERED that appellee's alternative motion for an extension of time to file appellee's brief is **DENIED AS MOOT**.

Dated this 12th day of April, 1999.

/s/HENRY A. POLITZ, RHESA H. BARKSDALE AND CARL E. STEWART

United States Circuit Judges

No. 2:96-CR-0032(01)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (AMARILLO DIVISION)

GENERAL DISCOVERY ORDER

IT IS HEREBY ORDERED:

I. Exculpatory and Impeaching Evidence and Information

Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government shall disclose all exculpatory or impeaching evidence. It is hereby Ordered that all material subject to production pursuant to Brady shall be disclosed to the defense. Such material shall be disclosed as soon as possible and, in any event, shall be disclosed sufficiently in advance of trial so as not to cause any trial delay. To the extent such exculpatory information is not subject to earlier pretrial disclosure due to such constituting a witness statement producible pursuant to Title 18, section 3500 of the United States Code, or Rule 26.2 of the Federal Rules of Criminal Procedure, then such statement may be produced in the same manner in which statements are produced, unless the failure to produce such statement earlier will result in a delay in the trial.

The government shall also disclose to the defendant, any and all agreements with any witness, and any and all promises or benefits which any witness has received, or expects to receive, as a result of giving testimony in this case. Such disclosure shall include, but not be limited to, any plea agreements with respect to criminal charges which are

presently pending or which are being held for filing by law enforcement authorities, and any and all agreements or benefits which have been promised to the witness, discussed with the witness, or which the witness is under the belief are available to the witness, to the extent the government has knowledge of such.

Further, the government shall disclose whenever any witness identified anyone other than a particular defendant as that defendant and, to the extent the government has such knowledge, any evidence of psychiatric reports, psychiatric commitments, or drug use it has concerning a witness. The government shall also disclose the existence and results of any polygraph examination administered to any witness.

II. Other Crimes or Uncharged Misconduct

The government shall disclose the general nature of any evidence of crimes, wrongs, or acts it possesses which it will seek to introduce against the defendant. The government shall also supplement such disclosure in a timely manner as new evidence under Rule 404(b) of the Federal Rules of Evidence is discovered.

III. Any Written, Recorded and/or Oral Statements of Defendant

The government shall permit the defendant to inspect and copy or photograph any written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known, to the attorney for the government. The government shall also disclose that portion of any written record containing the substance of any relevant oral statement made

by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer. The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

IV. "Catch-All" Heresay Exceptions

The government shall disclose to defendant the particulars, including the name and address of the declarant, of any statement it proposes to offer under the exceptions contained in Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence. Disclosure is ordered to be made sufficiently in advance of the trial or hearing to provide defendants with a fair opportunity to prepare to meet the statement.

V. Statements of Co-Conspirators or Co-Defendants

Any co-conspirator statements producible as Jencks Act statements shall be delivered as set forth in paragraph 'VIII' of this Order. Any co-conspirator statements, whether written or oral, which constitute exculpatory information or evidence, shall be produced as all Brady material is produced.

VI. Criminal Records of the Defendant and the Witnesses

The government shall produce to the defendant a copy of such defendant's prior criminal record, and the record of any co-defendant, if any, in this cause. With respect to the criminal records of witnesses to be called to testify, the government shall produce the criminal record, including any

FBI, Department of Public Safety, local police department or sheriff's office record or rap sheet, or other document reflecting prior arrests and/or convictions for any witness which criminal history the government presently has in its possession. Further, with respect to any witness the government has reason to believe has a criminal record, the government shall make an inquiry of the particular witness and cause a criminal history of any such witness to be run. The government shall also disclose the existence of any pending criminal charges of which the government is aware against a witness.

If, after the exchange of witness lists prior to trial, defendant or counsel for defendant, upon inspection of the government's witness list, has a good faith basis to believe any witness has a prior conviction, defense counsel shall bring the name of such to the attention of counsel for the government, and the government shall obtain the witness's date of birth and cause a criminal history check to be conducted prior to trial. Defendant and counsel for defendant are cautioned, however, that this is not to be construed as allowing any blanket request for the criminal records of all witnesses to be run, and any request not made in good faith shall be subject to appropriate sanctions. The government is not, by virtue of this Order, required to run criminal history checks on all of its witnesses.

VII. Expert Witness

If a request is made by the defendant(s), the government shall disclose to the requesting defendant(s) a written summary of any testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary shall describe the witnesses'

opinions, the basis and the reasons therefor, and the witnesses' qualifications.

VIII. Witness Lists, Exhibits, and Witness Statements

Consistent with the procedures in this court, the government shall produce, the day before a witness is scheduled to testify or the Friday before a Monday on which a witness is scheduled to testify, any and all witness statements which are producible pursuant to Title 18, section 3500 of the United States Code, and pursuant to Rule 26.2 of the Federal Rules of Criminal Procedure. Statements of persons not to be called as witnesses are not required to be produced unless the statements contain exculpatory matter which must be produced pursuant to Brady, in which case such statements shall be produced in accordance with paragraph 'I' of this Order.

Witness lists and exhibit lists shall be exchanged three (3) days prior to trial. Confidential informants testifying in this cause, if any, shall be included on the witness list and submitted to defendant at the same time the other witnesses on the list are disclosed.

IX. Documents and Tangible Objects

As required by Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure, all documentary and/or tangible evidence, including all books, papers, documents, photographs, tangible objects, buildings or places, intended for use by the government in its case in chief, or which is exculpatory or material to the preparation of a defendant's defense, or which was obtained from or belonged to the defendant, shall be disclosed.

X. Exemplars, Samples, and Results of Physical or Mental Examinations or Scientific or Fingerprint Tests

As required by Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure, the results of reports of any physical or mental examinations, and of all scientific tests or experiments, or fingerprint tests, along with all handwritten exemplars or tests, fingerprint impressions, blood samples, clothing, hair, fiber, voice exemplars, chemical analyses, or other materials relevant to this cause which are known to, or by the exercise of due diligence should be known to the government shall be disclosed.

XI. Transcript of Grand Jury Testimony

Grand jury testimony shall be disclosed only as required under the Jencks Act, and no other disclosure shall be required at this time. Defendant's recorded testimony, if any, before the grand jury which relates to the offense charged in the present indictment will be produced as set forth in paragraph 'III' of this Order.

XII. Evidence Obtained by Electronic Surveillance

Any and all evidence obtained as a result of instances of electronic surveillance of defendant conducted in this case, whether by wiretaps, videotapes, tape recorded conversations, or the like, shall be disclosed.

XIII. Preservation and Production of Rough Notes, Memoranda, etc.

The government shall preserve and instruct its agents to preserve their rough notes, memoranda, etc. No disclosure of such rough notes at this time, however, is required.

XIV. Evidence to be Used at Trial

The government shall follow its practice of compliance with its obligations under Rule 16 of the Federal Rules of Criminal Procedure and Brady, and shall make available the evidence it will use in its case in chief which is subject to discovery under Rule 16, any or all of which may be used in its case in chief at trial.

The disclosures and materials ordered to be made available as set forth in this Order shall be made available to the defendant(s) immediately, unless a different time has been set in this Order, e.g., witness list and exhibit list three (3) days before trial, etc.

If defendant seeks discovery of matters or items not ordered to be disclosed by this Order, then defendant, after conferring with counsel for the government, shall specify those additional matters about which discovery is requested and provide the court with legal authority supporting such additional requests. Any such request shall be made prior to the pre-trial conference and hearing before the United States Magistrate Judge. Further, unless such request is specifically brought to the attention of the court at such pre-trial hearing, such request shall be deemed abandoned and waived.

IT IS SO ORDERED. ENTERED this 26th day of July 1996.

/s/CLINTON E. AVERITTE

UNITED STATES MAGISTRATE JUDGE

No. 2:96-CR-0032(01)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (AMARILLO DIVISION)

ORDER ON PRE-TRIAL MOTIONS

I. Discovery Related Motions

The following motions filed by defendant have been **GRANTED** to the extent set forth in the General Discovery Order entered July 29, 1996:

1. Motion for Notice of the Intention to Use Evidence
2. Motion for Photocopies of All Statements by Alleged and Unalleged Co-Conspirators
3. Motion for Rule 26.2 and Jencks' Material
4. Request for Notice of Extraneous Crimes or Acts
5. Motion to Disclose Promises of Favorable Treatment of Threats of Prosecution Made to Government Witness
6. Motion for Brady, Kyles, and Giglio Material
7. Motion for Discovery and Inspection
8. Motion to Produce Evidence for Expert Examination

To the extent any relief in addition to that set forth in the court's General Discovery Order is requested, such relief is **DENIED**, except as granted elsewhere in this Order, in the General Discovery Order, at the Pre-Trial hearing, or as agreed by the Government.

II. Motion to Amend Motions or File New Motions Upon Receipt of Material from the Government

Defendant requests this court allow him to file further motions to suppress and for discovery, and to amend motions to suppress and for discovery presently filed, upon receipt of material from the Government. A review of the motions on file, however, reveals no motions to suppress have been urged by defendant. Defendant's motion is **DENIED** without prejudice to being re-urged should it become appropriate to do so at a later time.

III. Motion Requesting a Separate Hearing to Determine Admissibility of Hearsay Statements as "Co-Conspirator's Exception" to Hearsay Rule

By this motion, defendant requests a James' hearing requiring the Government to prove admissibility criteria has been met before statements made by a co-conspirator which would possibly implicate defendant may be introduced at trial. However, a co-conspirator's statements may be admitted by the trial court subject to later connection to establish admissibility and neither a James' hearing nor ordering of proof are required in the present case. See Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144(1987); United States v. Perez, 823 F.2d 854, 855 (5th Cir. 1987). Defendant's motion is **DENIED**.

IV. Motion in Limine

This motion will be ruled upon by the United States District Judge for the Northern District of Texas, Amarillo Division.

V. Motion for Bill of Particulars (July 12, 1996)

Based upon the discovery which the government has either made available, or is in the process of making available to counsel for defendant, defendant's Motion for a Bill of Particulars is **DENIED**.

VI. Motion to Dismiss Indictment (July 12, 1996)

By this motion, defendant seeks to dismiss the original 20-count indictment returned against him on June 18, 1996. The original indictment was superseded by a 25-count second superseding indictment on October 22, 1996. Consequently, defendant's motion is **DENIED** as moot.

VII. Motion for Bill of Particulars (August 20, 1996)

Based upon the discovery which the government has either made available, or is in the process of making available to counsel for defendant, defendant's Motion for a Bill of Particulars is **DENIED**.

VIII. Motion to Dismiss Superseding Indictment (August 20, 1996)

The undersigned will enter a Report and Recommendation to the United States District Judge concerning defendant's Motion to Dismiss Indictment. The United States District Judge will enter a final order on the motion.

IX. Motion to Sever

An evidentiary hearing on defendant's motion to sever was held on Wednesday, November 13, 1996 at 9:30 a.m. The Magistrate Judge will rule on this motion by separate order.

X. Motion to Continue and to Declare Case Complex

This motion will be ruled upon by the United States District Judge for the Northern District of Texas, Amarillo Division.

XI. Government's Motion for Production, Discovery, and Inspection of Defendant's Evidence

The Government's discovery motion is **GRANTED**. Any relief not granted by this Order is **DENIED**.

IT IS SO ORDERED. ENTERED this 13th day of November 1996.

/s/CLINTON E. AVERITTE

UNITED STATES MAGISTRATE JUDGE

No. 2:96-CR-0032(01)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (AMARILLO DIVISION)

ORDER DENYING DEFENDANT'S MOTION

On this date came for consideration the pro se motion filed by Defendant Hiram T. Carr on January 6, 1998 requesting the Court to take judicial notice of certain allegations of fact. Defendant's motion is **DENIED**.

IT IS SO ORDERED. SIGNED this the 23rd day of March 1998.

/s/MARY LOU ROBINSON

UNITED STATES DISTRICT JUDGE

No. 2:96-CR-0032(01)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (AMARILLO DIVISION)

ORDER DENYING DEFENDANT'S MOTION

On this date came for consideration the pro se motion filed by Defendant Hiram T. Carr on January 30, 1998 requesting the Court to compel the production of certain allegedly exculpatory documents, to permit discovery from his attorney and the government and its agents, and to provide a free transcript of all grand jury, pre-trial, and trial proceedings in this case. Defendant's motion is **DENIED**.

IT IS SO ORDERED. SIGNED this the 23rd day of March 1998.

/s/MARY LOU ROBINSON

UNITED STATES DISTRICT JUDGE

No. 98-10411

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGES: Before POLITZ, BARKSDALE and STEWART, Circuit Judges.

BY THE COURT: IT IS ORDERED that appellant's motion for findings and conclusions of law on which the three judge panel relied to enter its order of April 2, 1999 granting appellee's motion to dismiss appeal is **DENIED**.

IT IS FURTHER ORDERED that appellant's motion to extend time to file motion for reconsideration for a reasonable period after the motion for findings and conclusions is decided is **DENIED**.

Dated this 5th day of May, 1999.

/s/HENRY A. POLITZ, RHESA H. BARKSDALE and CARL E. STEWART

United States Circuit Judges